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The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation

Cover Page Footnote

The author is a Senior Research Fellow of the American Bar Foundation and a Professor of Sociology at Northwestern University.

THE DISCOVERY PROCESS AS A CIRCLE OF BLAME: INSTITUTIONAL, PROFESSIONAL, AND SOCIO-ECONOMIC FACTORS THAT CONTRIBUTE TO UNREASONABLE, INEFFICIENT, AND AMORAL BEHAVIOR IN CORPORATE LITIGATION*

Robert L. Nelson**

I. INTRODUCTION

ALTHOUGH large corporate law firms traditionally have claimed that they are organized to achieve high professional standards of competence and ethicality, many recent cases of abuse and deception in the litigation process have occurred in large firms.¹ This apparent paradox led this team of researchers to focus on the discovery practices of corporate litigators as one particularly interesting and important context in which to examine the supposed decline in the civility and ethics of litigation. Based on the in-depth conversations my colleagues and I held with litigators from large firms, as well as others in the litigating environment—judges, corporate counsel, and plaintiffs' lawyers—we attempted to assess the current state of affairs in discovery and develop preliminary explanations for the patterns we observed.

In this paper I argue that problematic behavior² is a rare but recurring feature of large-firm litigation. Given current trends in the institutional fabric of large firms and the environment of corporate litigation, it is likely to continue or increase. Conversations with large-firm litigators suggest that large firms are experiencing a set of fundamental transformations that make uncivil and unethical behavior more likely to occur, but that these firms have not developed effec-

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1. See generally Douglas M. Branson, *No Contest: Corporate Lawyers and the Perversion of Justice in America* by Ralph Nader & Wesley J. Smith, 48 Case W. Res. L. Rev. 459 (1998) (book review) (describing tactics used by large law firms to win cases and generate income at all costs).

2. The informants identified the following as problematic behavior: excessive disagreements over the proper scope of discovery; the tactical use of delay and deception; burdensome requests and responses; and the lack of prompt judicial attention to such behavior. See generally Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)*—"Much Ado About Nothing?" 46 Hastings L.J. 679, 697-705 (1995) (giving a brief history of discovery abuse).

tive organizational mechanisms to counter this growing threat. The image of litigation that emerges from conversations with lawyers and judges outside the large firms is a circle of blame. Each group of participants righteously defends its role in the system, while blaming others for problems in the system as a whole, including occasional excesses in their own adversarial behavior. Despite their criticisms, few are willing to call for basic changes in the system. Absent some external shock, we can expect the structured antagonism that encourages parties to engage in unreasonable, inefficient, and amoral behavior to continue.

I turn first to what we learned about the social organization of litigation in large law firms. After dealing with questions of how to define problematic litigation behavior, I examine factors that contribute to such behavior in large firms, the factors that tend to restrain such behavior, what the trends portend for the future, and prospects for change within these law firms. I then turn to the observations offered by judges, plaintiffs' lawyers, and inside counsel on the discovery process and the role that large law firms play in the system. I conclude with a discussion of the implications of these findings for understanding the litigation practices of corporate law firms, as well as prospects for reforming the system.

II. LARGE-FIRM LITIGATORS: EXPECT MORE ETHICAL PROBLEMS IN CORPORATE LAW FIRMS

A. *How Prevalent Is Problematic Behavior by Large-Firm Litigators?*

1. The Definitional Problem

One problem we struggled with throughout the project was the definition of deviant behavior in litigation. The academics attempted to finesse the issue by saying that we were interested in "professional choice-making." Such a term would recognize the subjective nature of defining deviance, but also would cover a range of bad and good behavior, from fraud and dishonesty to professional heroism. It also would allow us to discuss the more routine types of professional decisions that litigators make. This might help us analyze a broader range of behavior and how it was shaped organizationally.

Inevitably most of our conversations gravitated toward instances of deviant behavior. Most discussion centered on ethical breaches (such as knowingly withholding or destroying relevant documents) and ill-mannered or inefficient behavior (such as shouting at your opponent, mischievous document requests, or "burying" the opponent in paper). The ambiguity in our usage led to frustration and confusion. Near the end of a weekend, one associate commented on the difficulty he had understanding the discussion:

[W]e talk about ethical behavior and I say, "Well, what's the definition of ethical behavior?" . . . I mean that's where we start talking about the fuzzy, hazy big words like hardball and aggressive The ethical side of it is pretty clear, we all can pretty much spot an ethical issue and we know that we have a duty to take it up with those who are responsible and discuss it and take appropriate action. But in terms of trying to find ways to deal with the other aspect of it, hardball conduct, it's really a matter of style Is it a problem? Is it a problem to be an aggressive lawyer, that you are an aggressive advocate? . . . It's hard to find fault with those things. I mean you may look at people like that and say they're annoying or they're an asshole or something like that, but I have a tough time . . . distilling, is it right, is it wrong?³

While we occasionally talked about the mundane and the heroic (or "high professionalism"), the tacit point of reference was dishonest or gratuitously aggressive and obnoxious behavior. Midway through the first weekend conference one of the lawyer-informants referred to obnoxious, obstructive litigators as "assholes." The label stuck. The transcripts from that point on are littered with mentions of "assholes."

2. Problematic Behavior Is a Rare but Regular Feature of Large-Firm Litigation Practice

I came away from the sessions with the overall impression that all of our lawyer-informants had seen some kind of problematic behavior by corporate litigators. Such behavior predominantly involved incivility or "sharp practice" rather than dishonesty or clear ethical breaches. Some of our informants admitted that they may have behaved as "assholes" in some situations, usually in response to obnoxious behavior by opposing counsel. While our informants frequently suggested that lawyers from large firms, such as those represented in our discussions, were less likely to engage in deviant behavior, there were several indications that our informants knew of at least some individuals and firms that consistently misbehaved.

Two senior litigators, speaking off the record in one-on-one interviews, indicated that there were at least some unethical lawyers in all of the large firms in their city represented at the meeting. One informant spoke of personally witnessing three incidents of clearly unethical conduct by lawyers in one of the other large firms in her city. Another informant in a one-on-one interview described an incident in which a lawyer had asked him to suborn perjury. One associate spoke of the fact that there were partners in his firm for whom he would not

3. Quotations of statements by study participants are taken from the author's notes or from the transcripts of the study's structured group discussions. The transcripts, which are confidential to protect the identities of study participants, are on file with the author. For a brief description of the study, see Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 *Fordham L. Rev.* 837, 838-42 (1998).

work because they were overly aggressive. Several other lawyers relayed stories of offensive behavior they had encountered during depositions, such as being referred to as a Nazi, being called by their first name in a sexist fashion, or otherwise having to demonstrate their toughness in response to early, overreaching interrogation by opposing counsel. The more senior litigators had developed tactics for feeling out the integrity of their opponents. Several informants nodded in agreement when one of their peers described how he would experiment with minor agreements with opposing counsel early in a case to assess whether they could be trusted throughout the proceedings.

Some of our informants attributed most violations to individuals' personalities. According to this view, deviant individuals might be present in any firm, including large firms. Others thought there was a greater tendency for suspect lawyering in small, entrepreneurial firms that were struggling for a market niche. Other informants suggested in various ways that situational pressures could bring such behavior out, and that these situations could develop in large firms as well as elsewhere.

The upshot of our probes and discussions was that problematic behavior was an infrequent, but persistent part of large-firm litigation. It was perceived as more common now than in previous years, although the group was at a loss for how to develop a baseline for historical comparisons. Beyond several assertions that there had been a general breakdown in civility in litigation, we were unable to generate any discussion about whether there had been more subtle but pervasive shifts in litigation tactics over time which might have transformed the definition of "normal" aggressiveness. Most informants acknowledged that they would not know very much about the litigation practices of their partners, except in the unusual circumstance that someone outside the firm brought something to their attention. None of the informants thought there was an epidemic of unethical practices, but none of them denied that it was a potentially significant problem.

It is difficult to assess the gravity of the ethical problems in corporate litigation today. Although ethical breaches and other problematic behavior may be relatively infrequent compared to the great mass of litigated matters, what is an acceptable incidence rate? If one percent of cases contain troubling behavior, is that acceptable? For cancer rates, it would be shockingly high. What if the rate had risen in recent years to three percent? The relative frequency of problems would still be low. Oncologists, however, and I think lawyers too, would see it as a serious situation.

Given that there is enough evidence that we should treat these problems as serious, what are the factors in the organizational environment of large law firms that contribute to or prevent these problems from occurring? I will first proceed with an inventory of

both contributing and ameliorative factors. I then will assess overall trends in firms to speculate about which set of factors are on the rise, and which are on the decline. Based on that analysis, we can speculate about the prospects for ethical problems in the future.

B. *Factors Contributing to More Questionable Behavior by Corporate Litigators*

1. "It won't happen here."

Corporate litigators are reluctant to regard unethical or overly aggressive behavior as a serious possibility within their own sphere of practice, be it their own department or firm or the set of corporate firms they regard as their peers. A widely-shared reaction to the ethically problematic behavior of the lawyers in our hypothetical and real cases⁴ was that those lawyers were grossly incompetent. In the words of one of our consultants, the *Fisons* representation by Bogle & Gates was a "no brainer." The antagonist in the hypothetical materials used in our first weekend, the defense lawyer Weiss, was regarded as a laughable character. The behavior of the associate Fortenberry, who witnessed the nondisclosure of documents in the Kodak litigation, was treated as bizarre. Only a handful of our consultants expressed any understanding of his situation. The ethical breaches were seen as the product of extreme individual aberrations.

Another common theme in the conversations at all our weekends was that we were probably talking to "the wrong group of lawyers." The bar volunteers were especially willing to offer testimonials to the high ethical standards of the other firms represented at the meetings. Lawyers from those firms, it was consistently suggested, would not engage in ethically questionable conduct. The lawyers were most optimistic about their own firms. Although they admitted that the firms were not as homogeneous as they once were, due to growth and the addition of lateral hires from other firms, almost all mentioned that their firms hired "people like us." That is, they hired people who could be expected to hold high ethical standards.

The group tended to associate problematic conduct with "outsiders" of various sorts, such as opportunistic plaintiffs' lawyers or the more aggressive and entrepreneurial practitioners from small firms and split-offs. If anyone in their firms were a problem, it was likely to be lateral hires who had not been fully enculturated in the firm's ethical style.

Finally, it was striking that our consultants frequently dissociated the structural trends in their firms and in the market for corporate

4. The hypothetical and real cases given to the informants are reprinted in Report, *Ethics: Beyond the Rules*, 67 Fordham L. Rev. 691 app. (1998) [hereinafter Report].

legal services⁵ from rising pressures for ethically questionable behavior. At the end of the session with Litigation Section volunteers, nearly all our informants spoke about the transformation of legal practice from a profession to a business. They also almost universally insisted, however, that the changes had not produced conditions that made troubling conduct more likely.

In sum, our lawyer consultants thought that ethical problems would surface elsewhere in litigation; it was unlikely to happen in their own firms. Such an attitude may contribute to an environment that will make ethical breaches more likely to occur. If lawyers in large firms deny that the possibility exists within their own firms, they are unlikely to look for problems and unlikely to devise systems to monitor and discourage problematic behavior.

2. A Market for Aggressiveness

Several comments and stories suggested that there was a market for aggressive lawyer behavior, whereas the demand for ethical or highly professional behavior was not so clear. One associate said:

I don't think there's really a market at this point for being an incredibly ethical lawyer. It seems to me that while people in the [bar] will talk about those people who play hardball, have a really good win rate, and are scared by people who are perceived as unreasonable and will do anything to get their client's position through, there isn't that sort of same reputation talked about ethical lawyers. It's just not part of the nomenclature.

One partner attributed the growth of obnoxious behavior in litigation to what clients demand.

Given the fact that there is no law firm-client loyalty, such that all a corporation's matters will be handled by [one firm], clients begin to send the message that they are looking for the attack dog, the junkyard dog. I think that adds to the shrillness or the contentiousness. People are acting out in a way they think the client is going to be satisfied, until the client gets the bill. I had an experience recently where a company had hired an attack dog litigator. He had given them an enormous fee The senior executive of this company said, "That SOB never gave me a budget, never told me it was going to cost me this much. But he was a helluva lawyer and I would hire him again if I were really in trouble."

Several informants indicated that firms had internalized this perspective by teaching associates to err on the side of being aggressive. One associate spoke of being chastised by more senior attorneys for being "too reasonable" in dealing with opposing counsel during dis-

5. See generally John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar 160-66* (revised ed. 1994) (discussing structural changes in the legal profession).

covery. A partner revealed that she had lost two or three assignments because clients thought her manner too restrained for the kinds of cases they had. Another female partner told of her experience as a young associate defending a deposition of an elderly client when the more senior attorney was not available due to an emergency. Her orders were "to protect the client at all cost." She took an extremely obstructive style at the deposition, which resulted in the other side ending the deposition and filing a motion with the judge. Her behavior was applauded by her firm and became part of the firm's folklore. In that fashion aggressiveness, indeed, probably excessive aggressiveness, became enshrined in a valued war story.

3. Role Morality

The dominant position that clearly emerged from at least one of the weekends was that most litigators defined their moral obligations almost strictly in terms of the role they played in the adversarial process. That is, they had a duty of zealous representation to their client,⁶ but not a duty to step outside that role to attempt to achieve a more moral resolution of conflict.

Perhaps the most lively exchange in the weekend with Litigation Section volunteers touched on whether lawyers were obliged to have a moral conversation with their clients in situations in which it appeared that resolving litigation in a particular way might lead to further social harm at a later time. In the hypothetical situation, the client instructed her lawyer to settle a case to prevent further discovery about steel bars manufactured by the company that were implicated in a building collapse. One volunteer insisted the lawyer had an obligation to have a "moral dialogue" with the client. Speaker one suggested:

If this reinforcing bar were used in a hundred other buildings, a couple of orphanages, a sports stadium, . . . and they're actually trying to deep-six the information that this is a defective product, . . . I think you would have to have a moral discussion with this client as to what its obligations are, and in the worst scenario, if they are about to sell off the company, so they really don't care if something happens six months from now.

He was answered by the more widely accepted view, articulated here by a female partner.

Speaker Two: It's not a moral issue.

Speaker One: Yes it is.

Speaker Two: It's a legal issue.

Speaker One: It's a moral issue.

6. See Model Code of Professional Responsibility Canon 7, EC 7-1, DR 7-101 (1981) (providing that a lawyer should represent a client zealously within the bounds of the law).

Speaker Two: He can go talk to his minister if he wants moral advice. That's not why he's coming to you. Now that doesn't mean you as a professional aren't thinking about ethical issues. You are concerned about those.

After two of the academics asked probing questions about how lawyers could divorce judgments about ethics from general considerations about doing right and wrong, several lawyers responded with a faith in the fairness of the adversarial system overall.

I personally would have a problem even conveying my own view of the morality of the situation to a client. I think morality is a very slippery concept, primarily in the eye of the beholder And I think we all have a better ability as lawyers and human beings to be able to get a grip on ethical aspects of practicing law than this concept of morality.

In 3,000 years of history, someone decided before I came along, that these rules were the parameter of doing good and preventing bad. And I'm not going to lie in judgment over those rules and try to correct them Guys a lot smarter than me tried to create a set of rules that do good and prevent bad.

. . . [W]hat you are really talking around here is in fact a fundamental precept of the profession, . . . that clients . . . are entitled to representation by trained and skilled individuals who operate within the system [T]here is a real capital "G" good being described here.

Without entering the substance of this debate, I think it is possible to see the effect of the profession's role morality. It is to minimize the obligation of lawyers to exercise moral judgments or act as "counsel for the situation," to use Justice Brandeis's term.⁷ Role morality will provide justifications for more types of problematic conduct than would a more purposive definition of professional obligation.

4. The Imperative of Situational Judgment

The biggest problem with getting the lawyers to talk about the gray areas in their own professional decision-making was the salience of situational factors to evaluating "proper practice." The answer to almost every question was that it "depends." Aggressiveness generally is inappropriate, unless the war was initiated by the other side. Hardball usually is inappropriate unless there is a specter of mischievous plaintiffs' lawyers waiting to use the information from discovery for other suits. The hallmark of good lawyering is managing the relationship with clients so that no ethical lines need to be drawn in the sand.

7. See William H. Simon, *Ethics, Professionalism, and Meaningful Work*, 26 Hofstra L. Rev. 445, 467 (1997) (citing Alpheus Thomas Mason, Brandeis: A Free Man's Life 236 (1946)).

The imperative of situational judgment has several consequences. At the individual level, it blends ethical, moral, and practical considerations. Occasionally, a lawyer is confronted with a clear conflict between principle and practical pressures which becomes the celebrated war story of professional independence or is repressed, forgotten, and denied. More often, ethical and moral choices are redefined in practical, situational terms. As long as individuals follow "normal practice" within their field or organizational context, the ethical and moral implications are largely ignored. The ultimate backdrop is faith in the correcting capacities of the adversarial system.

At the organizational level, the imperative of situational judgment creates a zone of autonomy for individual practitioners where the organization will not second-guess their judgments. Thus, according to the associates, "basically, it is the partner's case. They get to decide how it will be handled." Outside the mention of special firm policies on receiving approval before filing motions for Rule 11 sanctions,⁸ there appears to be no horizontal scrutiny of how other partners handle their matters.

Most of our informants acknowledged that there were "assholes" in their firms, but there was no suggestion that these people were sanctioned by the firm. Why not? Who is to question their situational judgments? Given the proper circumstance, they might have to become an "asshole" for the day as well. The imperative of situational judgment is inconsistent with regulatory regimes within firms on all but the most basic problems such as drug abuse, sexual harassment, or conflicts of interest. The only thing firms can do is emphasize elastic control systems, such as "firm culture" (which internalizes proper situational judgment in members) or "ethics rabbis" (who provide situational counseling that ultimately defers to the judgment of individual practitioners).

At the profession-wide level, situational judgment is precisely the non-reducible quality that businesses hire when they hire outside counsel. Admittedly, corporate law firms also have plenty of technical and personnel firepower which is inefficient to develop within one corporation. The know-how to direct such resources, however, resides in the responsible partner.

This analysis implies that it will be very difficult to change the ethical cultures of firms because the organizations and their practices are built on a paradigm of situational judgments within an adversarial system.

8. Fed. R. Civ. P. 11 (providing sanctions for frivolous filings).

5. Loss of Control Over Litigation Due to the Rise of Inside Counsel and the Shift to Transaction-Based Client Relationships

In discussing the *Fisons* case,⁹ several lawyers noted that they sometimes become nervous about what their client discloses to them. Some inside counsel insist that only certain law firm personnel may be involved in discovery to hold down costs. The result is that outside firms are sometimes surprised by documents or other relevant evidence relatively late in the discovery process placing them at a disadvantage in the case. In these situations, outside counsel are put in an embarrassing position that may tempt them to withhold documents they might have produced at an earlier time.

Partners reported that corporations now have extensive rules about permissible litigation costs. In limiting costs, corporations are forcing firms to alter their practices, which in turn may decrease the quality of representation. As one partner said, sometimes he would like to spend more time reading cases and reviewing documents himself, but given client rules, he must rely on his instincts about what parts of a case require his direct attention.

The shift in the balance of power between inside counsel and outside litigators may affect the possibility for ethical breaches. As one of the Litigation Section volunteers noted, "That's something which has changed, in my opinion dramatically, since I started. We used to tell clients what to do, and that was it. A lot more we're asking clients, especially sophisticated clients, 'what are you trying to accomplish?'" Another participant argued that lawyers would not advise a client to destroy documents.

[P]eople have too much respect for their law licenses to ever tell somebody to destroy anything, you would be insane to give that advice.

....

I've seen it happen all the time. You don't know most of the time when they've destroyed documents. You only know when they're withholding documents. I'm telling you it's done all the time. It's done by in-house counsel, a lot and it occurs a lot, the destruction of documents.

The group disagreed about the general issue about how likely lawyers in their firms would be to destroy documents, but few disagreed with the underlying proposition that outside counsel often have less control over document review and production than they used to have.

9. See Report, *supra* note 4, app. at 885-87.

6. Breakdown of the Litigating Community

Several informants noted how the group of litigators has grown dramatically in the last two decades, resulting in lawyers and judges who seldom have more than one case with each other. In an earlier time, the community of litigators may have been able to exercise a measure of social control over its members. In an era of one-shot litigation, informal social control does not work so effectively.

As one senior litigator observed:

[T]he practice has changed because of the tremendous influx of lawyers in the last twenty years. In [earlier years] everybody knew literally everybody who were trying cases in a particular city and all the judges knew all the lawyers who regularly practiced. It was much more intimate than the practice is today. There were very few lawyers that you had to worry about, and people told you things about them if you did. That is not the case today, I am sorry to say.

7. Time Pressures

The lawyers agreed that many litigators were under tremendous time pressures in their practice and, thus, often did not have very much time to reflect on what they were doing. One partner offered time pressures as the explanation for Fortenberry's seemingly bizarre failure to report the existence of the documents in the Kodak-Berkey litigation.¹⁰ Several lawyers observed that there had been an acceleration of the pace of their practice due in part to technology. Another partner said that time pressures depend on what you are doing, but that he found remarkable the "quantity of information blasting at you." Other partners (both women) largely agreed that they were "working harder than they had expected when they were younger" and that practice was at a "frenetic pace." Three other partners (all men) indicated that they were working about as hard as they had expected to be.

The associates also revealed the effect of time pressures on their lives. When I was calling potential participants, it took me several more calls to line up associates than partners from the firms. Even though some expressed interest, their time schedules were too crowded to allow participation. In my one-on-one interview with an associate, the most salient issue in his professional work-life was the pressure of hours and deadlines. Several associates commented on the amount of work they had to do. All felt pressure to bill large numbers of hours a year, which meant putting in even more working hours (some of which could not be billed). As one associate reported, however, he had so much work to do that it was not really difficult to

10. See Report, *supra* note 4, app. at 890-95.

bill a large amount of hours. Work demands drove the quantity of time he spent working.

8. Lack of Guidance and Training for Young Associates

One of the consequences of the cost pressures in large-firm practice and the more intrusive review of billing practices by clients is that firms do not train associates in the same way they used to.¹¹ Partners spoke about how associates typically accompanied partners to trials and depositions so that they could learn the craft of litigating by watching more senior attorneys. Some firms had formalized rotation systems that exposed associates to several fields or departments early in their career. Those practices are largely gone now. Clients have rules about how many lawyers can staff a deposition. The hourly rates of both partners and associates do not allow much time for apprenticeship. Although firms have instituted the use of "training" account numbers to encourage their lawyers to engage in and keep track of such activities, incentives for billable hours and "actual work" undermine these systems.

One of the academics asked whether law firms in "the golden age" mentored associates to provide a "social control function for the profession" and whether firms did so today? One partner responded:

[Nodding negatively] [Firms are] too transient [now]. [In an earlier period] you went to a firm with the expectation you would stay there for a long time, if not your entire career. You were trained, people worried about whether you got the particular types of experience [you needed]. Now, I don't know, we hire a young man or woman out of a nice law school, the chances that they will stay, they are probably one in five or one in ten. The place is much larger, they are exposed to a larger number of people. There is not the sense—I was lucky, I had an excellent mentor—nobody is looking at these people and saying: "Get this experience or get this experience." Are they getting this experience? It is much more haphazard.

Training programs in firms have become just that. Firms often bring in outside professionals, such as clinical law professors, to run the programs in trial practice. It may cost the firms less than deploying their own star litigating partners. The impact on socialization into the organization and its ethical standards, however, seems obvious. One partner joked about having associates go through "deposition camp." Another partner insisted that formalized programs were "very real" for associates, and thus had a considerable impact on associate behavior.

11. See Paul A. Wolkin, *Foreword* to Theodore Voorhees, *On Training Associates* at vii-viii (1989).

When asked what firms could do to better realize their aspirations for high professional conduct, four of the nine associates called for firms to provide more explicit guidance and better training on ethical standards in litigation. Three of ten partners offered the same suggestion.

9. Difficulties of Horizontal Regulation

When we asked the lawyer-informants about whether they knew how their peers would respond to various ethical dilemmas, the consensus was that on most clear issues (i.e., the destruction of documents), they knew what their colleagues would do. On gray area issues, most admitted they did not know, and ordinarily would not learn, how such matters were dealt with unless they heard of a harsh reaction external to the firm (i.e., from a court opinion or lawyers in other firms). It is difficult for firms to monitor how various individuals and teams are operating because litigation is done in small groups. As one associate joked, firms cannot use "deposition police." Associates may in fact be the group who circulates among partners enough to be in a position to evaluate the partners' style and ethical judgments, albeit from the standpoint of less experienced attorneys. Some associates and partners offered the idea of using reverse evaluations, that is, associates anonymously evaluating partners, as a means of collecting firm-wide data on litigation behavior.

It may be that the perception that it is technically difficult to monitor litigators from the standpoint of a department or a firm is part of the ideology of the firm, rather than an objective fact. I alluded to this above under the rubric of the imperative of situational judgment. Nevertheless, it may be part of the reality of large-firm practice. Centralized auditing of litigation behavior may pose intractable problems, even if lawyers and firms were committed to such an enterprise. A round of questions to partners about whether it was their responsibility to ensure that their fellow partners adhered to standards of professional conduct demonstrated the mixture of ideology and practical limitations that appear to be at work. The partners offered different opinions about their obligations to monitor peers: Some said yes, some said no. They agreed, however, about the practical difficulties of monitoring. "I very much agree with what [X] said that one doesn't monitor one's partners. One really can't. One doesn't have time. None of us typically need it from our partners in terms of behavior."

10. Hierarchical Relations Chill Flow of Information About Problematic Behavior

Despite the efforts of many firms to encourage associates and junior partners to bring potentially troubling behavior to the attention of other partners, several associates and partners recognized that the hierarchical organization of firms, in which careers and earnings depend

on support from more senior attorneys, can suppress information about problematic behavior. One lawyer who had worked in both a smaller and a larger firm commented on the difference among firms in this regard.

In the less hierarchical, the much smaller firm, there was a much more open flow of information. There's less intimidation, there's more a current [sic] in your associates generally, so you feel more free and capable of speaking your mind. You're less intimidated of speaking to someone who is the head of your department or the head of your firm or bringing in someone who is fairly senior to discuss it with. In a larger firm, which is more hierarchical by nature, there are more barriers.

Another associate spoke of an experience when giving an opinion memo on the question of whether a lawyer in a different firm had committed an ethical violation which the offending lawyer's firm should report.

I gave the opinion that I thought it was My opinion was, over a period of weeks, deconstructed to the point where it was no longer something that was [unethical] I felt that was the wrong decision I remember going to someone else's office and saying, "You've got to hear this." . . . I decided definitely this person has misappropriated funds, it was a criminal act. I don't think there was any question about it. And I think that the client firm [who asked for the opinion] has the duty to report. And that [recommendation] was never adopted. [What] I described to this other person [was brought up as a criticism] by the person who rated [me in] my assessment. But it was sort of dropped after that. It never went anywhere.

What this last, somewhat ambiguous passage suggests is that the associate was criticized by the assigning partner for reaching a different conclusion on a question of lawyers' ethics. Apparently the negative evaluation did not do much damage to the associate. "It never went anywhere." Still, such a reaction to a clear "criminal act" might give pause to this associate and other associates who heard his story about raising ethical issues within their firm.

11. Decline of Loyalty: Clients to Firms, Partners to Partners, Firms to Associates

A recurrent theme in all discussions is a decline of loyalty and stability in the relationships that make up large-firm practice. No longer do clients stay with firms or lawyers for a continuing string of engagements. As one partner commented, outside counsel have "become a commodity" to clients. For all but the unusually large case, the "bet-your-company" litigation, clients think large-firm litigators are fungible. Some clients now allocate assignments for routine cases purely on the basis of hourly rates.

Partners in large firms often do not know all the other partners in the firm or how they practice. This in part is due to the size of firms, the development of multiple offices,¹² and the increasing number of lateral entries to the partnership.¹³ Lawyers working within smaller workgroups create their own "firms within firms" which may compensate for some aspects of the attenuation of personal relationships in ever larger firms. Yet these groups do not entirely control the terms of their members' relationship to the firm; they cannot guarantee partnership or compensation, for example. Additionally, it is now common for partners to change firms.¹⁴

Associates increasingly have a tenuous connection with the firms they practice in. Although many of the associates in our weekends identified strongly with their current firms, many felt uncertain about their futures in the firms. Most of the partners estimated that between one in eight and one in ten associates entering their firms would make partner.

I think that much of the discussion at our meetings pointed to the significance of loyalty in the maintenance of high professional standards. It is the lynchpin between the socializing and controlling effects of firm culture and the individual attorney. The Litigation Section volunteers spoke of ethical conduct as a kind of group bond, a duty owed to the reputation of the firm. Similarly, trust between clients and lawyers was important to negotiating a division of labor and a style of representation that would encourage adherence to high standards of ethicality, civility, and cost-effectiveness. Yet if those relations are just commodities, individual lawyers are likely to place a lower value on the collective good of a firm's or a fellow partner's reputation.

One might argue that there is a generalized culture of ethicality and high standards that pervades large corporate firms, which lawyers carry with them from one firm to the next. Our lawyers gave testimonials to this belief in some respects. Yet most informants returned to the position that there was something crucial about the culture of their firm. This implies that institutional loyalty is not simply a portable element of professional life. When lawyers make decisions of ethical significance, it probably matters that they feel sentimental links to their immediate professional group and not just an abstract professional community.

12. See Heinz & Laumann, *supra* note 5, at 163-64.

13. See, e.g., Sol M. Linowitz, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* 32-33 (1994) (discussing the negative aspects of the recent increase in lateral hiring).

14. See *id.*

C. *Factors Restraining Problematic Behavior in Litigation*

1. Firms as Ethical Cultures

Lawyers become anthropologists when talking about the social forces that prevent unethical behavior. They refer most frequently to the "culture" of their firm: a set of tacit understandings that law is practiced a certain way by the lawyers in the firm. They refer to a number of mechanisms that produce a group commitment to high standards of professional conduct: hiring "people like us"; telling associates what to emulate and what to avoid; organizational folklore—stories that vilify certain behavior and praise others; and efforts by the top lawyers of firms to communicate high ideals, by distributing memoranda on ethical topics, by giving speeches at firm functions about the importance of the firm's reputation for honorable behavior, and by promoting professional ideals in public activities and within the organized bar.

Lawyers often could only define their firm's ethical culture in the negative. Lateral entries to firms were a frequent point of reference, for they did not necessarily share the firm's culture. One partner who denied that it was her responsibility to monitor her partners spoke of the importance of culture to maintaining standards in her firm and of the threat that laterals posed to it:

You do adhere to [the firm's standards] and there is a culture. If I were to see someone doing something different, then I would necessarily do something about it. But I really haven't seen [problems]. The kind of people who come up through the ranks, they formed the culture, and unless you have some rogue lateral who is completely different than the rest of you, . . . ahead of time it is difficult [to know] hypothetically [how the behavior would differ from the norm].

When the academics challenged the lawyers about the power of culture in firms today, some agreed that it may not be a potent force. Others insisted vehemently that they "bore the imprint" of their firm and that they could not imagine what they would be like if they had practiced in a different firm.

2. Misbehavior Can Damage the Client

In response to the hypothetical situations concerning the discovery of documents, as well as the *Fisons* case and Kodak-Berkey Photo case,¹⁵ our lawyers were quick to point out how failure to disclose a document can create huge problems for a client later in litigation. The failure to disclose relevant documents can do much more to damage a client's case than the documents themselves. The lawyers suggested this was an important point to be made to clients and inside counsel.

15. See Report, *supra* note 4, app.

Obnoxious behavior also can have detrimental effects on clients. It may result in the suppression of valuable evidence. It also may unnecessarily prolong litigation and run up costs. Clients may not appreciate aggressive representation, if they come to think it created unnecessary costs with dubious benefits.

3. Misbehavior Can Damage the Reputation of the Firm

Likewise, misbehavior can damage the reputation of a firm. As one of the Litigation Section volunteers said, he has more respect for the other lawyers at his firm than to engage in behavior that may cast doubt on the integrity of the institution. In specific cases, misbehavior may lead to the loss of a client or damages. These effects may reverberate, as other clients hear of such behavior and take their business elsewhere.

4. Sanctions/Controls from Within Firms

The weekends elicited only a few stories about firms actually sanctioning lawyers for ethical misconduct, although we did not explicitly ask for an inventory of such events. Firms do occasionally take action to restrain the litigation behavior of their lawyers. Several of the firms had policies that certain kinds of motions, such as Rule 11 motions¹⁶ or motions for disqualification of counsel,¹⁷ had to be approved by the chair of the department or the firm. Firms obviously recognize that these are serious actions that may affect their status with clients and within the legal community. Additionally, it is possible to formulate a bright-line rule about them.

Firms also respond to obvious malfeasance. A partner from the Litigation Section volunteer group recounted the story of how his firm dealt with the discovery that an associate had lost a case by default by failing to make a court appearance, proceeded to deceive the client into thinking he had settled the matter, and billed for his services.

The manner in which firms deal with obnoxious behavior that may not be illegal or so easily identified by clear rules is more rare and ambiguous. Although not everyone admitted to the presence of "assholes" in their firms, many lawyers did. Firms typically did little to control them. One of our partners spoke of a counter-example

16. Fed. R. Civ. P. 11 (providing sanctions for frivolous filings).

17. See generally G. Luke Ashley & Richard L. Wynne, Jr., *Dealing with Conflicts in Joint Representation of Defendants in Mass Tort Litigation*, 17 Rev. Litig. 469, 494-95 (1998) (stating that "tactical reasons such as 'to delay proceedings, [to] deprive the opposing party of counsel of its choice, and [to] harass and embarrass the opponent' have become prevalent in large civil cases" (alteration in original) (footnote omitted)); Irene Graves, Student Commentary, *Confidentiality and Conflicts of Interest: How Waiver Affects Ethical Duties*, 22 J. Legal Prof. 267 (1998) (discussing the disqualification of counsel having a conflict of interest).

where a firm did react. Even in this instance, however, the firm apparently did not punish the “asshole” in question.

[W]e had one partner who has since left the firm who misbehaved in many situations. And it began coming back to us through opposing counsel, and, in a couple of cases, through judges’ decisions. “Mr. X engaged in a pattern of misconduct from the opening statement through the closing argument.” For example. This will catch your attention. And senior partners in our department talked with him, not to that much effect. And he elected to go elsewhere. He wasn’t pushed out by any means. But I think that’s rare.

Despite testimonials about the weakening of the community of litigators and the consequent dilution of informal mechanisms of social control within that community, the above and other stories indicated that informal networks can still function to provide feedback to firms on the misbehavior of their lawyers. One partner from a large firm told of how a judge had called and asked him to tell the lawyers at another firm of the obnoxious behavior of one of its associates.

5. External Sanctions or Rules

The lawyers at our sessions reported various attempts by judges and the courts to impose new rules on discovery and deposition practices that had the goal of limiting abusive behavior. These included rules limiting the length of depositions, the grounds on which objections could be made at depositions, and efforts toward mandating self-governing discovery. While our informants recognized that these changes might have some impact, they pointed to the limitations of the rules (for example, lawyers can stipulate out of some rules) and to the possibility that the new rules would simply produce conflicts around different terms.

Some of our informants argued that external sanctions imposed by the courts were the only effective mechanism for discouraging problematic behavior. Various lawyers offered testimonials to instances in which judges threatened, but ultimately did not execute, penalties for litigation misconduct.

Other lawyers disagreed, citing the fact that judges become involved in a tiny fraction of the litigation process and do not have the resources to effectively police advocates.

6. Innovations in Firms to Address Problematic Behavior

Many of the firms represented in our various groups had designed some type of system to deal with ethical problems. Perhaps the most common was to have a firm ethics committee that is charged with the responsibility of giving ethical advice to lawyers who had questions. In some firms, these committees or a designated “ethics rabbi” would deal confidentially with questions and complaints. At least some of

the lawyers in our groups chaired their firm's committee or were the ethics rabbis. These lawyers thought they served a useful function, but did not indicate from their experience that they were active monitors of their firm's ethical culture. Other lawyers voiced skepticism about the effectiveness of such internal channels. They worried that subordinates still would be reluctant to raise questions about the ethical practices of their superiors, and that partners would neither know nor pursue inquiries about their peers' conduct.

Another partner in our group cited an innovative policy decision giving responsibility for ethical supervision and training of associates to smaller workgroups within the firm. Apparently this amounted to a formal mentoring system through which all junior associates were assigned a partner in their workgroup. That partner was responsible for reviewing all aspects of the associate's performance, including adherence to professional standards.

7. The Market for Cost-Effective Conflict Resolution, Alternative Dispute Resolution, Arbitration, and Cost Pressures as Deterrents

Some of our lawyer-informants suggested that alternative approaches to litigation with extended discovery may begin to reduce problematic litigation behavior. Several indicated that arbitration, which has far more compressed discovery (if any), is less subject to abuse. Corporate clients increasingly include arbitration clauses in agreements and employment contracts, in part to reduce litigation expenses.¹⁸ As corporate clients and their inside counsel become more sensitive to the cost of litigation, they may create a market demand for cost-effective, if not less aggressive, litigation strategies. Indeed, litigation abuse may tend to cure the problem by driving parties from regular courts to forums that incur lower costs.

D. *Weighing the Trends*

What is the net effect of these various trends in the organization and professional context of firms? Optimists and pessimists can disagree on this question. My judgment is that large law firms are facing fundamental transformations that increase the possibility for problematic behavior in litigation, yet have not recognized the potential gravity of the systemic problems they face. The professional cultures of firms are powerful, if poorly understood, dimensions of firms. Because most large-firm lawyers embrace professional ideals and work to train their subordinates in these ideals, blatant dishonesty and gratuitous hostility are relatively rare among corporate litigators. There

18. See, e.g., *What Inhouse Attorneys Are Doing to Hold Down Costs*, Metropolitan Corp. Couns., Dec. 1997, at 24 (describing alternative dispute resolution as an important means of keeping litigation costs down).

are aspects of the ideology and incentive systems of firms, however, that contribute to these problems.

In many ways firms encourage aggressive representation that can blend into "win-at-all-cost" tactics. Given the intense competitiveness of the market for corporate litigation these days,¹⁹ more lawyers and more firms will be tempted to tread close to the line of unethical and untoward behavior. Lawyers will not do so all the time, however, and not even necessarily very often, but still more often than in previous times. Given the sheer volume and velocity of professional matters, it is increasingly difficult for firms to rely on informal monitoring mechanisms to prevent misbehavior. Even when large law firms dedicate themselves to maintaining the principles of high professional conduct—client demands, norms against intruding on the professional judgment of colleagues, and the growing complexity and specialization of practice will frustrate attempts to do so. In the face of dramatic changes in the organization and its environment, the innovations that firms have developed to maintain ethical standards amount to little more than minor tinkering.

Many of my research colleagues quoted the partner at our sessions who suggested that the cultures of firms are "fraying at the edges." Growth, the opening of branch offices in many cities, the addition of lateral hires who had not grown up inside the firm, and the intrusiveness of client demands on the organization of practice are weakening the normative fabric of firms. The chief bulwark against the rise of problematic behavior is, by this and many other lawyers' accounts, in decline.

As the culture of high professional standards weakens, one might hope that economic factors would begin to exert pressure in favor of ethical conduct. If litigation becomes too costly, stressful, and unpredictable due to declining civility and integrity among its practitioners, corporate clients and their lawyers will seek other avenues to resolve conflicts. The courts also have begun to recognize the harm posed by litigation misconduct and have begun to experiment with rules aimed at reducing the possibility for misbehavior.²⁰ Yet these counter-trends so far have had little effect. Further, it is unclear whether they can significantly remake the system.

While clients may be the source of a new consciousness about the cost of incivility and deception, lawyers depict their clients as schizophrenic. On the one hand, clients have devised elaborate systems to rein in litigation expenses. On the other hand, they frequently want to go for the jugular. On those occasions they favor lawyers who are "junk-yard dogs."

19. See Roger J. Dennis, *Commentary: The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 *Brook. L. Rev.* 677, 682-83 (1997) (reporting a significant escalation of economic competition among lawyers).

20. See *infra* note 21 and accompanying text.

New judicial initiatives face practical constraints. Courts do not have the capacity to adjudicate collateral disputes over the vast amount of litigation activity that takes place outside the courtroom. Thus far, judges have been unwilling to dramatically increase the cost of misconduct by barring crucial evidence or imposing other penalties.

E. *Prospects for Change Within Corporate Law Firms*

One way to assess the prospects for change within firms is to consider what our participants recommended to address the issues. Near the end of our weekends with partners and associates we asked both groups the following question: "What changes in the organization, incentives, or policies of your firm would you make to more fully realize your aspirations about proper conduct in litigation?" The partners offered only the most minor adaptations. Indeed, four of the ten said the equivalent of "none." One called for maintaining the firm's existing professional responsibility committee, one called for more discussions about standards, two suggested obtaining candid feedback from associates on their perceptions of the firm's standards or of the ethical behavior of partners. One called for de-emphasizing billable hours to encourage the noncompetitive aspects of the firm's culture. One partner went so far as to suggest that litigation misconduct by partners should result in financial penalties imposed by the firm.

The associates' responses also ranged from non-interventionist to interventionist, but the center of opinion clearly favored more significant changes in the incentive structures of firms and in relationships with clients. Three of nine concentrated on training and discussions. The remaining six mentioned more fundamental changes: changing the unstated practice of trying to win business by being more aggressive, "stop catering to clients who want one-shot service . . . where pressures to engage in aggressive and uncivil behavior are magnified," returning the legal practice to the status of a profession rather than that of a business to discourage competition among lawyers for business, reducing reliance on billable hours as a performance measure, ceasing to bill clients by the hour, and creating new rules about making motions for sanctions, as well as other "sharp" practices.

When we read the suggestions that had been offered by their partners to the associates, they were somewhat surprised. "I'm struck by the difference in perceptions. We seem to identify more occasions that we thought ethical issues were arising in terms of behavior and specific issues [that firms might address]. What I'm hearing from their responses is that there really is nothing wrong." Another associate said: "[I]t strikes me that either we are wrong or they don't see that [pressures toward incivility or abuse] exist[] or they see it and they don't care. Or they don't recognize it as a problem."

The group that has the more power in firms—the partners—were less likely to perceive the need for fundamental changes in the organi-

zation to achieve aspirations for high professional conduct in litigation. The less powerful group—the associates—tended to see a need for significant changes and were perplexed by the fact that their seniors did not recognize the issues in the same way.

This divergence in attitudes between partners and associates is a telling commentary on the need and prospects for change in large firms. At least the subordinates in firms find a link between the incentive structure of firms and the shift in standards of practice. Some of the associates' suggestions would strike the partners as naive. Partners "know" that firms would have a difficult time changing the nature of their relationships with clients or their billing practices. More disturbingly, many partners do not see a need for firms to change at all. Putting it somewhat crudely, the partners see the existing policies and cultures of firms as adequate to deal with pressures toward misconduct. The associates see the existing structures as inadequate to stem problematic behavior and favor changes that would restore and revitalize their ideal of firms as professional and ethical communities.

From my viewpoint as an organizational sociologist and scholar of the professions, it appears that large law firms are not yet willing to deal with litigation misconduct as a systemic problem that the organization can address. The partners who are in power remain wedded to the view that practice is a sphere of individual professional autonomy that cannot be regulated by the firm. Indeed, many fail to recognize that firm policies and marketplace pressures work to encourage departures from professional standards. Associates recognize the pressures they are under and how these can produce problematic conduct, and they are searching for solutions by changing incentive structures and adding more training. The associates, however, are also wedded to the individualist model of litigation practice.

Because corporate law firms do not conceive of ethical problems as a systemic problem, we can expect a continuing, indeed, probably an increasing, flow of reports about litigation misconduct in large firms.

III. ROUNDING OUT THE CIRCLE OF BLAME: THE PERSPECTIVES OF OTHER ACTORS

A. *The Judicial View: Lawyers Play Games, Judges Seek Truth (or Settlement)*

For judges, discovery disputes are an annoyance on which they spend relatively little time, (five percent according to one group of judges), that detract from the more important aspects of their work, and that are best dealt with by jawboning and case management rather than sanctions. As one judge characterized the problem, lawyers are interested in playing games in discovery—jockeying for strategic advantage and running up fees—while judges are interested in hearing the truth. The behavior of the defense lawyers in the *Fisons*

case was "appalling" and would have justified the imposition of sanctions. Yet for the judges in one city, similar kinds of dissembling were thought to be fairly common.

Judges said they were reluctant to apply sanctions against offending parties and that they feared they would be overruled on appeal. They decried the lack of support by appellate courts citing what they considered a horror story: An appellate court had reversed a contempt citation imposed on an attorney for uttering an obscenity about the presiding judge in open court. An elected state court judge spoke of the fear of political reprisals if he sanctioned a prominent attorney. A magistrate spoke of the fear of unfairly hurting a client for the behavior of counsel.

Despite these complaints, the judges thought the system worked well overall, as most cases settled. Defendants typically tried to hold onto documents and information after proper requests, but they were "entitled to spend money in their defense." Some judges suggested that better case management techniques were in place and would smooth future difficulties. Others spoke of the importance of judicial style. "You get about as much crap as you take," one stated. Others promulgated the timely bringing of the parties together to hammer out discovery disputes. The judges in a jurisdiction where they had tried self-enforcing discovery reported no effect from the change, a pattern that echoes the result of Rand's study of discovery innovations.²¹ Some judges said the biggest problem they faced was not unethical or excessively adversarial behavior, but lawyer incompetence.

The judges and magistrates who referee the discovery game clearly prefer to stay above the fray, letting the lawyers decide the outcome. They do not have the time, staff, or incentives to either intervene in discovery disputes in a sufficiently active manner, take control of the process, or establish clear norms about the reasonableness of requests or responses. Several judges and lawyers applauded the use of "discovery judges" whose job is to rule on discovery disputes. Yet such a mechanism seems like a rather small band-aid on a pervasive, deeply rooted problem.

In virtually every group of lawyer-informants we spoke to, someone called for more active judicial intervention in discovery. After speaking to the judges themselves, the prospects for a change in the orientation of judges to discovery seem remote.

B. *The Plaintiffs' Views: Institutionalized Corruption or Manageable Adversarialism*

The plaintiffs' lawyers we spoke to were veterans of many years of discovery disputes. As such, they evinced a battle-hardened outlook

21. James S. Kakalik et al., Rand Inst. for Civil Justice, *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* at xxviii (1996).

on the litigation process, the judiciary, and opposing counsel from large law firms. Most not only had survived, but also had made a lot of money from their work. Others spoke openly of aspiring to gain the kinds of cases and judgments their peers already enjoyed. Most were quite cynical about the discovery process. One senior attorney described the system as "institutionalized corruption," which was designed to allow large law firms to employ huge numbers of lawyers in litigation, and which judges knowingly tolerated.

Most other participants stopped short of this characterization. They too thought defendants constantly attempted to delay and defeat discovery requests, and that judges often were biased against plaintiffs' lawyers. They also felt that the rules ultimately favored disclosure and that good plaintiffs' counsel had the tools necessary to extract crucial information from their opponents.

The plaintiffs' lawyers came across as rights-based entrepreneurs, a group of successful Davids in a world of corporate Goliaths. They were critical of many aspects of the discovery process and many plaintiffs' lawyers who they felt were not up to the task, yet they seemed to relish their role within the system.

The plaintiffs' lawyers almost uniformly reacted to the *Fisons* case²² as a clear violation of the ethical rules, as quite typical of defense tactics, and as explainable in part by the failure of the plaintiffs in the case to force the defense to respond to specific requests. As the plaintiffs' lawyers saw it, the defense in *Fisons* raised a red flag by rewriting the initial request concerning theophylline-based products, without explicitly challenging the scope of the initial plaintiffs' request. While some plaintiffs' attorneys were willing to see much of the defense behavior as falling within the bounds of zealous advocacy, there was virtual agreement that the August 1988 affidavit by a Bogle & Gates attorney stating that all relevant documents would be produced, even though the attorney knew the documents relating to a theophylline-based product existed and would not be produced, was inappropriate.²³

Much of the discussion revolved around variations in such behavior and the techniques plaintiffs' attorneys use to deal with them. The group reported that certain large law firms had reputations for especially hardball tactics, but they also acknowledged that there was considerable variation by individuals within firms. When we asked the group to name the three most ethical and three least ethical firms in litigation, there was only weak convergence in the responses. In City A, only one firm received two votes for most ethical, one firm received three votes for least ethical, and three received two votes for least ethical. All other firms were mentioned only once. In City B,

22. See Report, *supra* note 4, app. at 885-87.

23. See *id.* app. at 886-87.

one firm received three votes for most ethical, while two received two votes for most ethical, and other firms received one vote each. One firm in City B received three votes for least ethical, two firms received two votes, the remainder received one vote. Indeed, six firms appeared on both the least and most ethical lists. These results suggest that firms have reputations for litigation style, but that experiences with particular firms can vary significantly across cases.

Discovery problems also vary by field of law. Drug cases are structured by the national disclosure policies of companies, whereas securities litigation is a one-shot proposition involving a finite sequence of events. Medical malpractice litigation is characterized by a large number of continuing relations between plaintiffs' attorneys and defense attorneys, as lawyers on both sides appear in numerous cases. As such, at least one plaintiffs' lawyer thought, that sub-field had developed a set of shared expectations about proper discovery behavior. In employment cases the plaintiff starts out with much more information about the defendant organization than is typical of other cases, because they are or were an employee. Yet this advantage may be outweighed by the generally low reputation employment claims now hold. Commercial litigation was thought to involve more civil behavior because the corporate lawyers often switch sides from one case to the next.

The variations in type of lawsuit and type of opponent affect plaintiffs' lawyers' discovery tactics. Yet plaintiffs' lawyers were quick to compare notes on tricks of their trade. Several spoke of discovery as a race to the first motion to compel, causing the other side to become serious in production or risk alienating the judge. They debated among themselves about the relative value of documents and depositions as a route to "the truth." There was consensus that motions for sanctions were to be used sparingly because they were too costly in time and effort and a distraction from the plaintiffs' overriding interest in moving the litigation along quickly. Instead of seeking sanctions for their own sake, plaintiffs' lawyers attempt to establish a record of delay and avoidance by defense lawyers, with a goal of undermining defense credibility before the judge. Lawyers who had experience in jurisdictions with self-disclosure rules lambasted their effect. In their view, defense counsel would voluntarily turn over a minimalist definition of relevant documents; the parties still had to fight over more serious discovery issues.

One of the most telling observations by a plaintiffs' lawyer, which his peers agreed with, was that judges had a tendency to "split the baby in half" on discovery requests. He had tried different tactics in writing requests, sometimes focusing narrowly on very specific documents, sometimes making broad ranging requests. His experience taught him that it did not matter because the judge always compromised between the plaintiffs' and defendants' versions of what was

relevant and appropriate production. As a result, he felt there was no incentive for plaintiffs' lawyers to act reasonably in discovery requests. They had to approach the matter as a bargaining problem.

Plaintiffs' lawyers were very sensitive to status differences between themselves and large-law-firm counsel, and between themselves and judges. One lawyer spoke of large-law-firms as old boys' networks that traditionally excluded certain social groups. Several spoke about the elitism of large law firms. Many thought that judges, because they frequently came from corporate backgrounds and upper-class institutions, tended to be biased against plaintiffs' lawyers, although state court judges were seen as more likely to have represented plaintiffs in practice.

One informant characterized judges as being jealous of plaintiffs' lawyers and the money they made. The same lawyer poked fun at large-firm attorneys, describing the decor of corporate law offices as similar to funeral parlors. He cited his personal pledge to never wear a white shirt. Corporate litigators, he contended, dressed like funeral directors. He regaled us with a story about a settlement conference with defense attorneys at which he threw money into the air just to see if he could elicit a response. The edge to his stories and the comments of several other participants underscored the deep-seated antagonism some plaintiffs' lawyers feel toward both their opponents and some judges.

Despite this antagonism, the plaintiffs' lawyers spoke of their economic interdependence with large-firm attorneys. Defense counsel needed plaintiffs to make money. The plaintiffs' attorneys acknowledged that they expected firms to put up enough of a defense to make some money from a matter. Until a fee was generated, serious settlement discussions were unlikely to ensue. Major lawsuits were "like an annuity for a large firm, a way for a partner to pay for his daughters' braces or college education." Plaintiffs' lawyers also expressed sympathy for the pressures that confront outside defense counsel. As one plaintiffs' counsel stated, she did not have to worry about losing a client when she made tactical judgments in litigation, but that was exactly what confronted attorneys from large firms in today's competitive marketplace.

Our plaintiffs' lawyers-informants also criticized incompetent and inexperienced plaintiffs' lawyers. Lesser plaintiffs' lawyers were a problem because they could not properly fulfill their duty to their clients. They also tended to pollute the environment of contest and negotiation between plaintiffs and defense. Some plaintiffs' lawyers tended to settle too early, which tended to lower expectations about settlement amounts for cases in the aggregate. The informants laughed at how these lawyers were characterized by a famous litigator from a corporate law firm: "What is a pilgrim in the law? An early settler."

At various times the academics, and even some of their own group, challenged the "white knight" self-image that was implicit in the plaintiffs' lawyers' discussion of their role. Plaintiffs' counsel vociferously rejected the notion that they would file frivolous lawsuits. They claimed it was not in their self-interest to do so. Plaintiffs' lawyers see themselves as making investments in cases, as taking on considerable expense and risk in mounting a case. They argued that they could not afford to take cases that were not meritorious because the cases could not pay enough to make it worthwhile.

The plaintiffs' group acknowledged that serious ethical issues arose in their work, such as over the coordination with other plaintiffs' attorneys on large matters, dealing with clients who fail to disclose potentially damaging information, and so forth. Some also indicated that they thought some kinds of litigation (employment and FELA²⁴ cases were cited) more often involved frivolous claims. Yet in terms of their fundamental role in the system, the plaintiffs' lawyers were self-righteous. They represented people with valid claims. They had to invest time and money to advance those claims against powerful opponents in a system that was biased against them. As such, they were important players in the delivery of justice.

Why, we asked them, did it seem that plaintiffs' lawyers were losing the rhetorical battles over tort reform? They answered that insurance companies and other defense groups had waged a very effective campaign in the media, as well as in several legislative arenas. What changes in the system would they advocate? Our City A group turned the question back to us, and suggested that we write a report and conduct research that exposed the lack of responsiveness in defendants' answers to discovery requests. Other informants suggested that judges needed to play a stronger role by actively encouraging the parties to agree to a schedule for discovery and by promptly ruling on disagreements. Some plaintiffs' lawyers favored specialized courts for discovery matters, while others worried that judges should not abdicate their direct control over the issues. Moreover, others advocated the elimination of incompetent plaintiffs' lawyers.

Plaintiffs' lawyers are cynical about the discovery game. They distrust defense counsel. They think judges have double standards towards plaintiffs and defendants or are aloof from discovery matters. They cannot say how many times they are lied to, but they assume it is frequently. Yet discovery is a game at which they are good. They frequently receive enough documents and information to win substantial judgments. The system may be inefficient and dishonest, but the game goes on and plaintiffs' lawyers continue to play.

24. Federal Employer's Liability Act, 45 U.S.C. §§ 51-60 (1994).

C. *The Views of Inside Counsel: Protecting the Bottom Line from Lawsuits and Large Law Firms*

Inside counsel are loyal to their companies and critical of those who may damage company interests: plaintiffs who sometimes file frivolous suits and oftentimes make unreasonable litigation demands, judges and juries who make runaway judgments for plaintiffs, and large-firm attorneys who run up legal fees due to their tendency to provide a "Cadillac" defense, when a "Saturn" would do, and who are expensive in part because they do not know how to manage their own firms effectively. In this imperfect world, inside counsel have little difficulty taking tough positions on discovery requests. They show active disdain for the complaints of outside counsel that economic pressures are making law firms cut corners in practice.

Inside counsel have a clear vision of how they would reform the civil justice system: tort reform defense-style. They would eliminate contingent fees, cap damages, and impose legal costs on the losing party. Our conversations with inside counsel thus demonstrate the mirror-image of the patterns described by large-firm attorneys and by plaintiffs' lawyers: all three describe similar phenomena, yet each explains the phenomena differently.

For example, inside counsel tended to reject the *Fisons* case as some kind of aberration because it contained crucial, undisclosed facts that would have changed the ethical complexion of the matter. *Fisons* could not happen in their company. Beyond the possibility of negative fallout in the specific litigation, several inside counsel spoke of the potential damage to the corporate reputation that might result from the Bogle & Gates approach. Others stated what seemed like a company slogan: "If we are wrong, fix it. If we are right, fight it." Some suggested that the Bogle & Gates approach might have been typical of tactics ten years ago, but not today in their companies. One participant suggested that the right thing to do would have been to "tee up" the issue of what the appropriate scope of discovery would be, rather than give an ambiguous response that they would disclose all relevant documents.

Other inside counsel were less willing to concede that the defense was wrong in *Fisons*. Several counsel stated that they had no obligation to win their opponents' case for them, and that there was nothing wrong with making plaintiffs ask a more specific question. The plaintiffs had remedies they could have pursued but chose not to do so.

Other counsel suggested that if one looked at the overall ethics of such litigation, you would see a very different picture. The overall picture included junk science and unreasonable plaintiffs' demands for monetary settlements. The reality was that legal standards of liability did not equate with standards of morality. Therefore, defense counsel should exercise their judgment to minimize risks to their client.

We pushed defense counsel to consider the scope of their obligations in discovery by asking whether they were obligated to turn over a relevant, "smoking gun" document to a plaintiff if defense counsel came into possession of it on the eve of reaching a settlement with the plaintiff. In our hypothetical, the document clearly fell within a standing discovery request, but there was no other deadline that compelled delivery of the document to the plaintiffs. None of the inside counsel said they would feel compelled to produce before completing the settlement. When asked to explain why not, several inside counsel said that "this system is screwed up." They reported that if they litigated in that fashion they would be crucified. "If we thought the system were just, we would be more inclined to disclose such information."

Inside counsel see plaintiffs' lawyers as unreasonable. One litigation counsel spoke of "the entitlement mentality" that pervades society and has infected civil litigation. Another suggested that if a plaintiff had a good case for a \$2 million claim, the lawyer would seek \$20 million in damages. Inside counsel also discussed the burdens that litigation imposes on a corporation. Plaintiffs' lawyers were not sensitive to the real costs of having to search for documents, the disruptive effects of making management available for depositions, or the real difficulties inside counsel have in trying to bring their business people to cooperate with a search request. When discussing information retention and destruction programs, inside counsel simply commented that thousands of employees work within their companies. Furthermore, they did not know everything that went on in their company; indeed, no one did.

Much of the discussion at the sessions concerned relationships with outside counsel. This was a topic inside counsel were eager to discuss. Virtually all counsel indicated that they play a direct, active role in litigation, which several referred to as the "partnering" concept of litigation management. The standard model of relationships with outside firms was that the legal department kept a list of "approved firms" that could be used on matters. The participants discussed how they hired, and occasionally fired, firms. A few lawyers told how they had let local counsel go because they did not feel the lawyers were sufficiently zealous in their representation. This seemed more a concern over diligence and attention than adversarialism as such. One litigation counsel indicated that he sometimes chose firms he perceived as more aggressive when dealing with opposing counsel whom he thought to be aggressive. The same lawyer said that outside counsel were his gladiators, that he wanted them to be tough.

Other informants offered counter-examples. Inside counsel for a bank voiced a preference for outside counsel who would conduct themselves in a manner consistent with the bank's reputation as a responsible member of the community. Another described an instance in which he had removed an outside law firm from a case because he

thought they had made an unwise and possibly unethical decision on document production in an earlier phase of the litigation. Contrary to what we had heard from our sessions with large-firm attorneys, the comments suggested that there is a market for ethical and reasonable representation.

When we raised the complaint offered by outside counsel that they were under economic pressure from inside counsel to reduce costs, and that this had negative consequences for ethicality, civility, and training, inside counsel reacted bitterly. Clearly we had struck a raw nerve. Inside counsel rejected the notion that the new competitiveness in corporate legal services had any negative consequences, on ethics or anything else. "Law firms are not the last repository of high ethical standards." "Business people have high ethical standards too." "Such complaints are bemoaning the loss of something that never existed. Look at the Clark Clifford case. He supposedly was the ideal of the ethical law firm attorney." "Worrying about changes in the large law firm is like worrying about the loss of the family farm. What is the point?" "Large law firms have no one to blame but themselves. If they learned how to manage their operations efficiently, they would not be in the situation they are in."

The inside counsel then traded stories on the difficulties they had in persuading outside law firms to change their litigation styles. Outside firms only knew one way to litigate—the "Cadillac" style. Corporation lawyers were trying to have law firm attorneys come back to them with questions about alternative ways to spend resources in litigation. Inside counsel were willing to make cost-benefit judgments. Outside firms seemed reluctant to compromise on costs out of fear of losing a case and the prospects for future work. What the inside counsel wanted, however, was to be consulted about such strategic judgments before they took place.

Inside counsel very much reflect the interests and outlooks of clients. We heard numerous stories about what companies make, what they do, and how a particular firm or industry was unique in its legal needs. The cost of outside law firms, for example, threatened to add a penny of cost to a fifty cent snack item. The lawyers in our inside counsel groups shared an identity as business litigators, yet each seemed to bear the imprint of the company he or she worked for. Furthermore, all expressed enthusiasm for the business goals of their companies. Perhaps the group nature of the discussion tended to elicit a certain booster mentality.

In contrast to the "us-them" characterizations of plaintiffs' lawyers and outside counsel, however, there was no us-them between the inside counsel and their employer. Some inside counsel expressed gratitude at the kind of corporation they worked for: In their view, they were spared tough moral decisions because their company did not do bad things. One inside counsel said that lawyers working for some

companies, like the tobacco companies, would necessarily be implicated in morally ambiguous work. He felt no such tension in his work for his company.

We probed the extent to which these lawyers were in a position to exercise independent judgment on legal and ethical matters and again found that these lawyers reported very little strain in performing their professional duties. One informant spoke about the need to persuade businesspeople on economic and practical rather than moral grounds, but the gist of his comment was that he was capable of shaping company policy.

Other inside counsel addressed the standard problem of defining who the client was in a corporation.²⁵ Lawyers expressed willingness to go above the head of a manager if they thought that person was not cooperating. Yet the discussion seemed very abstract, as a kind of hypothetical possibility. No one shared war stories of such difficulties or how in fact they were dealt with. The business environment seemed to constrain the professional judgments of these lawyers only indirectly. One of their main tasks is to make decisions about what legal problems deserve the attention of senior management. Several general counsel indicated that their senior management did not want "any legal surprises."

Another informant described the "life cycle of litigation in a corporation." Early on, management might be very supportive of litigating a dispute, behavior which outside counsel often tended to encourage. Then, after the expenditure of some significant money and the passage of time, he could observe that management would begin to lose its ardor to fight. As costs mounted, management would begin to see a case as a problem they wish would go away. Very often that would set the stage for settlement. Inside counsel was in a position to see this process repeat itself, and could try to help management come to an understanding of the phenomenon in an attempt to forestall unwise litigation costs. Yet, the inside counsel had to go along with management judgment.

The economic performance of the company also affected litigation behavior. During fiscal quarters in which a company is short on cash, management will discourage legal expenditures. Thus, inside counsel will manage cases to time legal expenditures to match the immediate financial needs of the corporation.

We concluded the sessions with corporate counsel by asking what changes they would propose in the discovery process and civil litigation more generally. The overwhelming weight of the suggestions, particularly in City B, were partisan defense positions: make losing parties pay, put caps on punitive damages, eliminate contingency fees, and tort reform. A few lawyers mentioned improvements in the han-

25. See Model Rules of Professional Conduct Rule 1.13 & cmt. (1983).

dling of cases, the so-called "rocket docket,"²⁶ in which discovery matters are dealt with very quickly. The emphasis in these proposals was to improve the civil justice system from the standpoint of their clients. Indeed, one participant announced to the group that a new tort reform group was forming in the state and he asked them to contact him if they were interested in becoming active. Of the four groups of lawyers we spoke to, the corporate counsel were most single-minded in calling for changes in the system. The changes they called for, however, reflected the particular parties they represented in litigation, rather than concerns about the functioning of the system as a whole.

IV. CONCLUSION

The problems that beset the discovery process in civil litigation—excessive disagreements over the proper scope of discovery, the tactical use of delay and deception, burdensome requests and responses, and the lack of prompt judicial attention to such behavior—are deeply rooted in the adversarial structure of the process; the professional world views the actors have developed in response to the structure, which in turn perpetuate these dynamics; and the incentives that reinforce antagonistic and unresponsive behavior. Civil discovery is a circle of blame. Participants can blame their own unreasonable behavior on the unreasonable behavior of their opponents or judges, or on the fact that "the whole system is screwed up." The result, of course, is that the system becomes more "screwed up."

The spiral of misbehavior and excuse in civil litigation is not strictly speaking a prisoners' dilemma. Participants are not forced to be unreasonable and unethical by their opponents. Litigators are neither so constrained in their repertoire of responses, nor are they at such a disadvantage in terms of the information they possess about their opponents as the hapless prisoners of game theory. Instead, we learned from talking to the players in the discovery game that they held deeply-entrenched beliefs about how other actors behave. While each group had their own definition of a worthy opponent with whom the game would be played fairly, the starting assumption in much litigation is that the opponent is unworthy. Hence, the spiral of misconduct can begin quite easily.

Some might hope that as an adversarial process, the system would be self-correcting in some sense. At least some lawyers respond that if an opponent is misbehaving there is a solution: take the problem to the judge. Indeed, all three groups of lawyers pointed to judges as pivotal to changing how the system operates. Yet it seems clear after

26. See, e.g., *Garcia v. McCutchen*, 940 P.2d 906, 913-15 (Cal. 1997) (describing the creation of fast-track dockets in California); Heather Russell Koenig, *The Eastern District of Virginia: A Working Solution for Civil Justice Reform*, 32 U. Rich. L. Rev. 799, 815-18 (1998) (discussing the advantages of Virginia's "rocket docket").

talking to the judges about how they view these disputes, as well as after talking to lawyers about the tactics they deploy, that judicial intervention is not likely to be the answer. Judges do not have the time, resources, or inclination to constantly monitor the discovery process. Stronger judges who were committed to changing the norms of the system would probably help. They will need considerably more resources to do so, however.

If judges are not likely to break this cycle, would new rules? The attempts made thus far, chiefly self-discovery, appear to have failed. Changing the rules only changes how the details of the contest are waged.

True to the premises with which we started this project, the problems in discovery seem to be beyond the rules. The civil litigation system has fostered an adversarial culture in which legal professionals practice delay and deception, and rationalize such conduct based on an ideal of zealous representation. An adversarial system may always be prone to such a problem. Yet in the classic conception of lawyer professionalism, lawyers would balance the need to be effective advocates for their clients with a concern for insuring that the system worked fairly. Given that no one can effectively police many of the professional judgments of lawyers, in part due to strong canons of client confidentiality, it was up to the professional's sense of ethics and morality to produce a fair process.

Whether that ideal ever had much real effect on the behavior of litigators we cannot determine. It now appears, however, to be very much in jeopardy due to the changes that have taken place in the social organization of litigation and the organization of law firms, corporate legal departments, and the plaintiffs' bar. There is now very little consensus on what the rules of discovery mean. Lawyers in different positions see the *Fisons* case in very different terms—from an “outrage” to “nothing wrong.” In a vacuum of agreement on discovery norms, the incentives to push the edge of acceptable practices will gradually transform the working norms. In the new competitive marketplace for corporate legal services there are plenty of incentives to push the edge. Although the inside counsel we spoke to did not explicitly state that they only rewarded the most aggressive litigators, it is clear that they do not see the civil litigation system as governed by moral considerations. Inside counsel make their own pragmatic judgments of fairness. In such an environment, it would be surprising if law firms did not do the same thing, with the added pressure of needing to win.

What, if anything, should be done to reform the discovery process in civil litigation? One might answer, “Nothing.” The system works reasonably well. Publicized problem cases like *Fisons* come up rela-

tively rarely. When they do come to light, sanctions are imposed.²⁷ In the process, other participants may learn a lesson. Yet, it appears to us that if the system simply continues as presently constituted, it will limp along and professional standards will slowly deteriorate. Some parties have the option of exiting the system to alternative dispute resolution.²⁸

This is, however, not the case for many other actors, especially the less resourceful. Moreover, even if one took a market view of the civil litigation system, and saw it as just one alternative mode for resolving disputes, why should the courts and the American legal profession allow this arena to decline? At a minimum, given the size of this regular system of adjudication, there is significant harm in letting this sector deteriorate.

The participants in our discussions seem to favor a second course: moderate reform. Measures mentioned include specialized magistrates and judges for handling discovery disputes, active case management by judges, more frequent imposition of sanctions, and making the sanctions actually stick. Yet these changes, where they have been tried, do not seem to have had dramatic effect.²⁹ The problem may be that these measures do not attack the root of the difficulties in the system. None of these measures fundamentally change the incentives for how the discovery game is played or monitored. Even under these innovations, there will be pressures to push the edge of acceptable practices, to seize whatever strategic leverage may exist in the system, in order to enhance one's competitive position within a market for litigation services or the internal hierarchy of a law firm, or in the search for favorable judgments by plaintiffs' lawyers.

A third level at which to seek reform is to attempt to revamp the meaning of professionalism within litigation in the institutions in which it is practiced—law firms, corporate law departments, the plaintiffs' bar, and the trial bar generally. Sappy invocations to observe higher professional standards are not enough. What our conversations suggest is the need to give professionalism teeth in the organizations where most professional judgments are made.

I suggest that there is much more that firms can do to maintain high standards of litigation behavior and prevent misconduct. In addition to more ethical training and guidance for associates, firms could engage in various forms of ethical auditing. Departments and work-

27. See, e.g., *Childs v. Argenbright*, 927 S.W.2d 647 (Tex. Ct. App. 1996) (imposing sanctions on an attorney for discovery abuse). See generally Gerald W. Heller, *Sanctioning Attorney Misconduct: Playing by the Rules*, Fed. Law., Jan. 1998, at 38, 38-39. (describing various grounds for sanctions).

28. See generally Committee on Continuing Prof'l Educ., ALI/ABA, *A Practical Guide to Achieving Excellence in the Practice of Law: Standards, Methods, and Self-Evaluation* 385-93 (1992) (describing various forms of alternative dispute resolution and suggesting their consideration).

29. See *supra* note 21 and accompanying text.

groups could be asked to formulate plans that would articulate standards of practice and propose mechanisms for ensuring compliance. On a rotating basis, departments, workgroups, and individual lawyers could be evaluated in terms of their performance with respect to these standards. Such evaluations might include a review of a sample of their cases and conversations with clients and other lawyers inside and outside the firm who have had an opportunity to observe their conduct. An ethical evaluation system would cost firms time and money and would be resisted by many who will see it as an unnecessary intrusion into their professional prerogatives. Yet some kind of organizational program is necessary to deal with problems that are the predictable result of changes in the organization of firms and their institutional environment.

Similar programs could be adopted for corporate law departments. Moreover, corporate lawyers could begin to draft model policies for the treatment of discovery requests. In the now infamous Texaco case,³⁰ the alleged destruction of documents took place after external counsel forwarded the plaintiffs' request to inside counsel. In such an instance, perhaps there should be an operating rule that requires external counsel to obtain formal assurances from company officials that no documents that might be considered relevant have been destroyed.

In the heterogeneous world of plaintiffs' lawyers, it is more difficult to conceive who would perform such gate-keeping functions, although plaintiffs might organize their own collectives for these purposes. Self-regulation in the past has worked to exclude historically disadvantaged groups. While it would be necessary to guard against invidious forms of regulation, the development of mechanisms to insure that plaintiffs' lawyers were competent to handle the cases they take, and that they dealt with matters appropriately, might redress the concerns of plaintiffs' lawyers and defense lawyers alike that the system was operating ethically and efficiently. Is accreditation for plaintiffs' lawyers ludicrous?

Ironically, then, I come to suggest a new set of rules to invigorate professional standards in litigation. What is different about these rules is that they address institutional processes, rather than attempt to alter the substantive rules about professional duty. Lawyers are masters at arguing about exceptions to rules. It is time to begin to charge lawyers with responsibility for designing systems that regularly and actively analyze professional judgments. Without efforts at sys-

30. See *United States v. Lundwall*, 1 F. Supp. 2d 249 (S.D.N.Y. 1998) (involving two former officials of Texaco in criminal proceedings for obstruction of justice because they destroyed documents related to an employment discrimination claim). See generally David E. Brodsky, *Think Before You Shred That Document: Destroying it Can Be a Criminal Act*, N.Y. L.J., July 6, 1998, at 9 (mentioning *Lundwall* as an example).

temic reform in practice organizations, the circle of blame in civil discovery will continue.

POSTSCRIPT: FURTHER RESEARCH

This project can be thought of as a small beginning in what might be a much larger program of research into the relationship between professional organizations and professional ethics. It is a beginning both because we have analyzed only one kind of professional organization—the large law firm—in some depth and because our inquiry has been limited to a relatively small number of informants from a relatively small number of firms. The factors that impel and restrain problematic behavior in large law firms will not be the same as those that operate in other organizational contexts. Corporate counsel offices and government agencies, to name but two contexts, will contain a quite different configuration of incentives and control structures that will influence professional decision-making by lawyers.

For the legal profession to gain a better understanding of the kinds of ethical choices lawyers make in practice requires attention to the real world contexts in which lawyers operate. It would be profitable to launch similar inquiries about professional choice-making in other organizational contexts.

The format of this project has advantages and limitations. By bringing together groups of lawyers, promising them confidentiality, and stimulating discussions about their decisional tendencies in various ways, we were able to generate many insightful observations and to gain a sense from the groups about the overall state of affairs in large-firm litigation. It was very important that we held separate meetings for partners and associates, for it gave both groups an opportunity to be more candid than they might have been if they were together. We gave some opportunity for the anonymous disclosure of information through one-on-one interviews and spontaneous “hallway” conversations. This lends additional credibility to the observations we gathered. In all, the group discussion format was very efficient in generating a set of preliminary observations. At this state of our knowledge, similar programs for other practice settings also would be useful contributions.

This format does not provide systematic data on professional decision-making in an organizational context. Interviews with, or observations of, many more lawyers and firms would be necessary to develop a more definitive analysis of the issues raised here. Such research also is much more costly and difficult to execute. The results from the group discussions certainly will help to inform more ambitious research efforts.